IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEITH RAYSHAWN GOMEZ, Appellant.	No. 32225-1-II UNPUBLISHED OPINION

PENOYAR, J. — Keith Rayshawn Gomez appeals his convictions for first degree murder, first degree assault, and unlawful possession of a firearm. After an altercation at a club, Gomez shot at rival gang members, killing one man and injuring another. Because Gomez fails to show error at trial, we affirm the convictions. Gomez claims that his offender score was improper because a jury did not find that he was on community placement when he committed the crimes. He also claims that his firearm enhancement was improper because the jury only found that he was armed with a deadly weapon. We remand for resentencing because the jury verdict does not support a firearm enhancement.

FACTS

Gomez was involved in an altercation on the dance floor at the Bar Code nightclub in Olympia. The altercation took place around 1:30 a.m. on April 2, 2004, when young men started

yelling and "throwing gang signs" at one another. 1 Report of Proceedings (RP) at 19.

Gomez was a gang member. He argued with rival gang members Elisha Marcus and Corey Wilson. Marcus and Wilson were at the Bar Code that night with fellow gang members Marquis Mitchell and Keyaun Howell, both of whom Gomez later shot.

In breaking up the altercation, Bar Code bouncer John Trujillo grabbed Gomez and carried him out the club's back door. Club co-owner Robert "Sonny" Jelvik and bouncers Armand Ruffin and Shayne Jasper assisted Trujillo in ejecting Gomez from the club.

As security was escorting Gomez out, Gomez told Jasper, "You'll think it's about to get served," which Jasper took as a threat. 1 RP at 156-57. Ruffin and Jasper heard Gomez say he was getting a firearm. Ruffin told Trujillo what Gomez said about getting a gun. Ruffin then watched Gomez go down the alley and cross the street to the parking lot opposite the club.

At the same time Trujillo grabbed Gomez, bouncer Matthew O'Hare grabbed another participant in the dance floor altercation and took him out front. Others from the dance floor followed O'Hare outside. A few minutes later, Trujillo came out to deal with a second argument taking place in front of the club. Bar Code co-owner Joseph Laroque was outside the club as well.

Laroque, Trujillo and O'Hare then saw Gomez coming toward the club with a bandana covering his lower face. Trujillo pointed out Gomez to O'Hare and Laroque and said to watch Gomez because he had been talking about getting a gun. O'Hare then saw Gomez pull a gun from his waistband. He shouted that Gomez had a gun and began pushing people back into the club as shots were fired.

Jasper, who had gone out front, watched Gomez fire the gun at one of the men standing in front of the club. From inside the club, Jelvik

looked out the front window and saw Gomez shoot a man and then flee across the street, shooting back toward the club. Howell received five gunshot wounds and died soon after. Mitchell was shot in the leg as he was fleeing.

Jermaine Coll, a member of the same gang as Gomez, was at the Bar Code that night, although he did not see Gomez there. Coll was in front of the club arguing with Wilson when he heard the gunshots. Coll then ran across the street to the parking lot before realizing that he had been shot through the buttocks.

Olympia police officer Duane Hinrichs was on duty nearby when he heard the shots. He saw Darryl Warren, Wilson, and Mitchell jumping into a vehicle and driving off, so he stopped the car and apprehended them. Mitchell needed medical attention for the gunshot wound to his leg. Inside the car, police found a 9 mm semi-automatic pistol. Police later determined that this gun likely shot Coll. Warren and Wilson were charged and sentenced for Coll's shooting.

Police found the cartridge cases for the 9 mm on the ground down the street from the Bar Code, leading them to believe that Warren or Wilson stood at the west end of the block and fired up the street. Gomez, in contrast, used a .38 caliber or .357 magnum revolver to shoot Howell and Mitchell. He had been standing in front of the Bar Code firing toward the club.

Howell's autopsy disclosed five gunshot wounds, one from about 18-24 inches away, close enough to leave gunpowder deposits. Another bullet entered through his back. Four bullets were recovered from Howell's body during the autopsy. Police recovered two additional bullets at the club and determined that all six were fired from the same gun, probably a revolver. One of the two bullets found at the club contained both Howell's and Mitchell's DNA. Police believed this bullet passed through Howell when he was near the ground, then passed through Mitchell's

leg as he ran away.

In their initial interviews with police, Bar Code security personnel said that the shooter was the same man they kicked out the back door a few minutes before the shooting. Police then received information from a confidential source that Gomez was the shooter. Police put together a photo montage that included Gomez's picture, and Trujillo, Jasper, and Jelvik all identified Gomez when police showed them the montage individually. Before showing the montage, police gave each employee a standard "admonishment" that included a warning not to discuss the montage with others.

About a week after the shooting, police learned that Gomez had gone to Las Vegas and registered at a motel using the name Bryant Moss, a fellow gang member. Gomez was arrested in Las Vegas and returned to Olympia for trial. He was charged with first degree murder of Howell (count I), unlawful possession of a firearm after having previously been convicted of second degree assault (count II), and first degree assault of Mitchell (count III).

At trial, the State offered the testimony of Mark Berry, a sheriff's deputy with expertise in gang culture. The jury saw photos of the tattoos on Gomez's arms and Berry explained the significance of the gang symbols in those tattoos.

Berry then explained the role of respect in gang culture and how when a gang member suffers disrespect, violence against a rival gang member will allow one to regain respect. The State's theory was that Gomez suffered disrespect when the bouncers ejected him from the club and that he shot Howell to regain the lost respect.

The jury convicted Gomez on all three counts. For counts I and III, the court gave the jury a special verdict form asking, "Was the defendant Keith Rayshawn Gomez armed with a deadly weapon at the time of the commission of

the crime?" Clerk's Papers (CP) at 101, 104. The jury answered "yes" on both forms. CP at 101, 104. Gomez did not object to the verdict forms but, rather, offered ones with the same language.

Gomez was sentenced to a total of 791 months confinement. His offender score of nine included one point for his being in community custody at the time of the offenses. He also received two five-year enhancements for being armed with a firearm.

ANALYSIS

I. Firearm enhancement

Gomez claims that his two five-year firearm enhancements violate *Apprendi*[1] and *Blakely*[2] because the jury only found that he was armed with a deadly weapon, not a firearm specifically. Gomez relies on *State v. Recuenco*, 154 Wn.2d 156, 162, 110 P.3d 188 (2005), *cert. granted by Washington v. Recuenco*, 126 S. Ct. 478.

In *Recuenco*, the trial court used a verdict form with the exact same language as the verdict form that the court used here. *Recuenco*, 154 Wn.2d at 159. The jury was asked whether the defendant was "armed with a deadly weapon" at the time he committed the assaults. *Recuenco*, 154 Wn.2d at 159. The jury determined that he was. *Recuenco*, 154 Wn.2d at 160. Because the evidence at trial showed that Recuenco was armed with a gun, the judge gave him a firearm enhancement. *Recuenco*, 154 Wn.2d at 160. The Washington Supreme Court reversed the firearm enhancement, holding that it violated *Apprendi* and *Blakely* because the jury had only found that Recuenco was armed with a deadly weapon. *Recuenco*, 154 Wn.2d at 162.

[1] *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[2] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The court held that Recuenco did not invite the error, even though he proposed similar instructions. *Recuenco*, 154 Wn.2d at 163-64. Instead, the court determined that Recuenco was objecting to the sentence itself, not to the instruction. *Recuenco*, 154 Wn.2d at 163-64.

Because *Recuenco* controls, we reverse the firearm enhancement and remand for resentencing consistent with the facts the jury found.

II. Community placement

Gomez claims that the trial court erred in calculating his offender score because it included one point based on his being on community placement at the time the current offense occurred. He claims that whether he was on community placement was a fact that the jury had to determine beyond a reasonable doubt. The State responds that the sentencing court was permitted to determine whether Gomez was under community placement.

A defendant may challenge an offender score calculation for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. *State v. Ford*, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). We review a sentencing court's offender score calculation de novo. *State v. Mitchell*, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

In a recent Division One case, the court concluded that whether someone was on community placement at the time of an offense is a fact that a jury must determine beyond a reasonable doubt. *State v. Jones*, 126 Wn. App. 136, 144, 107 P.3d 755 (2005), *review granted*, 124 P.3d 659. Unlike the fact of a previous conviction, one cannot simply look at a judgment and sentence to determine whether an offender was on community placement at the time of the offense. *See Jones*, 126 Wn. App. at 144. One must analyze the Department of Corrections' records as well, and Division One determined

that this was a factual inquiry for the jury. *See Jones*, 126 Wn. App. at 144.

Division Three came to the opposite conclusion in *State v. Brown*[3] and *State v. Hunt*.[4] These cases reasoned that the community placement consideration was part of calculating defendants' offender scores to determine their standard range sentences. *Brown*, 128 Wn. App. at 314-15; *Hunt*, 128 Wn. App. at 541. They said that the extra point added to the offender score does not violate *Blakely* because the community placement consideration did not lead to an exceptional sentence. *See Hunt*, 128 Wn. App. at 541-42; *Brown*, 128 Wn. App. at 314-15. Division Three also determined that because community placement arises out of a prior conviction, *Blakely's* constitutional considerations did not require a jury's factfinding. *Brown*, 128 Wn. App. at 315, *Hunt*, 128 Wn. App. at 542.

Division Two is divided on the issue. In *State v. Hochhalter*,[5] two members of this court followed Division One and held that *Blakely*'s exception for prior convictions should be limited to facts that appear in the prior conviction itself. *State v. Hochhalter*, 131 Wn. App. 506, 521, 128 P.3d 104 (2006). In *State v. Giles*,[6] a different Division Two panel disagreed with *Hochhalter* and followed Division Three. *State v. Giles*, __ Wn. App. __, __ P.3d __, 2006 Wn. App. Lexis 830, 7-8. *Giles* held that whether a defendant was on community placement at the time of the offense is not an aggravating factor increasing the defendant's sentence beyond the standard sentencing range and, therefore, the additional offender point based on community placement

[3] 128 Wn. App. 307, 315, 116 P.3d 400 (2005).

[4] 128 Wn. App. 535, 542, 116 P.3d 450 (2005).

[5] 131 Wn. App. 506, 128 P.3d 104 (2006).

[6] __ Wn. App. __, __ P.3d __ (2006).

status does not implicate *Blakely* or require a jury factual determination. *Giles*, 2006 Wn. App. Lexis 830, 11 (2006).

Consistent with *Giles*, we hold that the fact of community placement need not be proved to a jury because it arises directly from a defendant's prior convictions. *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Hughes*, 154 Wn.2d 118, 135, 110 P.3d 192 (2005) (affirming the rule that a jury need not find the fact of a prior conviction). Traditionally, information about prior convictions is withheld from the jury for policy reasons to prevent prejudice to the defendant. *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *United States v. Santiago*, 268 F.3d 151, 156 (2nd Cir. 2001). A court may, consistent with due process, find not only the fact of previous convictions but other related issues as well, including issues related to recidivism. *Santiago*, 268 F.3d at 156.

In sentencing, the trial court must resolve numerous questions, including timing issues, when calculating a defendant's offender score. For example, the trial court must determine the timing of a prior offense in order to know whether enough time has elapsed so that the conviction no longer counts toward the offender score. RCW 9.94A.525(2). This can involve an issue of when the defendant was released from custody after serving his original sentence for the prior offense. *See In re the Personal Restraint of Higgins*, 120 Wn. App. 159, 163-64, 83 P.3d 1054 (2004) (applying the rule that incarceration for a probation violation is confinement pursuant to the underlying felony).

Moreover, sentencing is not limited strictly to reviewing the judgment and sentence documents alone, as *Jones* seems to hold. For example, a sentencing court must sometimes decide whether prior offenses constitute the same criminal conduct for purposes of the offender score. RCW 9.94A.525(5)(a)(i); *State v. Mehaffey*, 125 Wn. App. 595, 600-01, 105 P.3d 447 (2005). Sentencing courts must also determine if a prior out-of-state conviction is comparable to a criminal offense under Washington law. RCW 9.94A.525(3); *e.g., In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 257-58, 111 P.3d 837 (2005). Although the facts of a prior case must be admitted by the defendant or found by a jury, a trial court may need to review the record of a previous case before calculating an offender score. *E.g., Lavery*, 154 Wn.2d at 257-58 (determining that an out of state conviction is neither factually nor legally comparable to Washington statute).

Our approach is consistent with *Hughes*, which dealt with aggravating factors and exceptional sentences. *Hughes*, 154 Wn.2d at 135-36. The court in *Hughes* noted that prior convictions are used to determine a defendant's offender score and, therefore, an exceptional sentence requires more than just a prior conviction history. *Hughes*, 154 Wn.2d at 135. For a trial court to impose an exceptional sentence because a presumptive sentence was too lenient, that court would not only have to consider the prior convictions but would also have to find that some extraordinarily serious harm or culpability resulted from the defendant's multiple offenses. *Hughes*, 154 Wn.2d at 136-37. *Hughes* held that this necessary additional finding caused an exceptional sentence to be outside the "prior convictions" exception and to require a jury determination. *Hughes*, 154 Wn.2d at 137.

In this case, we are not concerned with an exceptional sentence but, rather, with how Gomez's criminal history should affect his

offender score. Applying a defendant's criminal history to determine the offender score involves a myriad of factual and legal issues beyond the mere existence of a prior conviction. To require jury verdicts on every issue surrounding a prior conviction would make Washington's determinate sentencing scheme unworkable. A more reasonable approach is to allow the sentencing court to apply all the factors that allow the defendant's criminal history to impact the offender score.

Our approach is consistent with statute because a defendant being on community placement is not an aggravating factor under RCW 9.94A.535(2) and (3), the exceptional sentence statute. *See Giles,* 2006 Wn. App. Lexis 830 at 6. Instead, it is a sentencing factor used in determining the offender score under RCW 9.94A.525(17). *See Brown*, 128 Wn. App. at 314. Furthermore, we are not convinced that either *Blakely* or *Hughes* gives the defendant a Sixth Amendment right to a trial by jury in calculating his offender score.

Because the trial court did not offend *Blakely* or *Hughes* by determining that Gomez was on community placement at the time of the offense, we hold that Gomez's offender score was properly calculated.

III. Evidence of convictions of the other participants in the incident

Gomez next claims the prosecutor improperly informed the jury of Wilson's and Warren's convictions for shooting Coll. Specifically, the prosecutor entered the respective informations and judgment and sentences into evidence.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

We find no error in admitting the

information or the judgment and sentence documents. If they were standard judgment and sentences, they did not give any facts about the crime. They had some probative value in explaining the story with the second gun and demonstrating that Gomez was not a suspect in Coll's shooting. Therefore, the trial court properly admitted the charging and plea documents for Warren and Wilson.

IV. False testimony

Gomez claims the prosecutor knowingly elicited false testimony from Robert Jelvik. Gomez claims the angle of the security camera shows that Jelvik could not have seen the shooting from his location in the club. He claims Jelvik "is the only one who said he saw the shooting and identified me as the mask [sic] man positively." Statement of additional grounds (SAG) No. 2

However, Gomez has not established where the camera was positioned inside the club or that its angle was identical to Jelvik's view.

As a factual matter, Jelvik was not the only person who witnessed the shooting or who identified Gomez as the shooter. Gomez had the opportunity to cross-examine Jelvik, but he did not question him about whether his sightline was adequate. Ultimately, Jelvik's credibility was for the jury to decide. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Gomez has not shown on appeal that Jelvik's testimony patently was false.

V. Self defense

Gomez claims the State failed to show the absence of self-defense. However, Gomez never requested a jury instruction on self-defense, nor was there any evidence at trial that could have supported a self-defense claim. Gomez's defense theory was that the State had failed to prove that he was the shooter.

When a defendant claims self-defense,

he must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Robbins*, 138 Wn.2d 486, 495, 980 P.2d 725 (1999) (citing *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Gomez claimed at sentencing that he was innocent. He never claimed to have committed the shooting in self-defense.

VI. Testimony about gang culture and Gomez's gang affiliation

Gomez claims that the trial court erred in allowing expert testimony by police officers about how gang members react to disrespect. He says this evidence and the photographs of the gang tattoos on his arms was inappropriate and unfairly prejudicial "profile" evidence.

Evidence of other crimes or bad acts is admissible under ER 404(b) as proof of premeditation, intent, motive, and opportunity. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). In applying ER 404(b), a trial court must engage in a three step analysis: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identified fact more probable; and (3) balance on the record the probative value of the evidence against its prejudicial effect. *Campbell*, 78 Wn. App. at 821 (citing *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990)). This court reviews the trial court's ER 404(b) rulings for abuse of discretion. *Campbell*, 78 Wn. App. at 821.

Here, the trial court determined that testimony about gang codes of conduct was admissible because of its probative value in explaining the events. The trial court limited the testimony about gang culture, requiring that the experts only address the issues of respect, disrespect, and retaliation. The trial court

admitted the photos of Gomez's tattoos because his gang membership explained the events surrounding the crime.

We hold that the testimony about gang culture was properly admitted. The State had to show premeditation and intent in order to convict Gomez. The expert testimony was highly probative of the State's theory that Gomez shot Howell to regain respect after the bouncers expelled him. *See Campbell*, 78 Wn. App. at 822. The expert testimony helped the jury understand the State's theory and show Gomez's premeditation, intent, and motive. *See State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998); *Campbell*, 78 Wn. App. at 823.

We also hold that the trial court did not abuse its discretion in allowing the pictures of Gomez's gang tattoos. The tattoos showed that Gomez was actively involved in a gang. Gomez did not testify himself and several witnesses claimed that they were not aware of Gomez's gang involvements. Because the shooting was probably gang related, Gomez's gang involvement was relevant. *See* Boot, 89 Wn. App. at 789; Campbell, 78 Wn. App. at 822.

VII. Prosecutor's argument about Howell being shot in the back

Gomez contends that the prosecutor committed misconduct during closing arguments by asserting that Howell was shot in the back. However, the pathologist who conducted the autopsy testified that one bullet entered Howell's back and that this shot was the "most fatal wound." 4 RP at 591. Because the evidence at trial showed that Howell was shot in the back, the prosecutor's argument was proper.

VIII. Prior assault conviction

Gomez claims that the trial court erred in allowing his attorney to stipulate in open court that Gomez had a prior second degree assault conviction. Gomez claims this information was unduly prejudicial. Gomez could have

stipulated at trial to a "serious offense" without the offense being named. *See State v. Young*, 129 Wn. App. 468, 474-75, 119 P.3d 870 (2005).

Because Gomez stipulated to the assault conviction, the invited error doctrine prevents him from claiming prejudicial error on appeal. The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally. *See Recuenco*, 154 Wn.2d at 163. The doctrine has been applied to errors of constitutional magnitude. *Recuenco*, 154 Wn.2d at 163 (citing *City of Seattle v. Patu,* 147 Wn.2d 717, 720, 58 P.3d 273 (2002)). Therefore, the trial court did not err in allowing the stipulation.

IX. Suggestive photo montage

A. Communication among the employees

Gomez claims error because the police went to the Bar Code to show the photo montage to the employees. He claims the Bar Code employees were able to confer with each other and so the identification was tainted and possibly facilitated.

An out-of-court photographic identification violates due process if it is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). To establish a violation, the defendant bears the burden of showing that the identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118.

We hold that Gomez has not met his burden of showing that the photographic identification violated due process. The police showed the montage to each witness individually and gave each one an admonishment not to discuss the identification with others. Gomez has presented no evidence other than speculation that they spoke to one another.

B. Larocque's testimony

Gomez also claims that Larocque "did not pick me out of the montage, but was allowed to point me out to the jury as the mask shooter." SAG No. 7. However, the record contains no indication that Larocque was shown the montage. His in-court identification of Gomez appears to be the first identification he made. Essentially, Gomez is challenging the reliability of Laroque's eye-witness identification. This is a credibility determination that we leave for the jury. Gomez fails to show that Larocque's testimony was improper.

X. Sufficiency of the evidence

Gomez claims the evidence was not sufficient to convict him. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Salinas*, 119 Wn.2d at 201.

Credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). We accord circumstantial evidence equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

We hold that the evidence in this case was sufficient. The bouncers who expelled Gomez got a good view of his face. Several of them heard Gomez reference a gun and then Ruffin watched Gomez go to the parking lot across the street. When Trujillo saw Gomez out front a few minutes later, he recognized him as the same

man he had just expelled. Several witnesses saw Gomez shoot Howell. The State had sufficient evidence for a rational juror to find guilt beyond a reasonable doubt.

XI. Failure to call a witness

Gomez claims error because the prosecution did not call Artis Lewis, a witness on its witness list. He claims that Lewis's testimony would have been favorable to the defense because he would have testified that the shooter was not anyone in the club that evening.

Under CrR 4.7(a), the prosecutor must disclose and preserve all evidence that is material and favorable to the defendant, as well as witnesses' names, addresses, statements, and expert reports. CrR 4.7(a); *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993)). Here, Gomez alleges the prosecutor failed to call a witness. Because the witness was on the prosecution's witness list, the State appears to have disclosed the witness to Gomez. Therefore, Gomez could have called Lewis when the prosecutor did not. Without evidence that the prosecution withheld this witness, Gomez has not shown any error.

XII. Mischaracterizing the witnesses' testimony

Gomez claims that the prosecutor misled the jury by stating that Ruffin and Jasper heard Gomez say, "I am gonna get a gun." SAG No. 10. Gomez claims the bouncers did not testify to hearing those exact words. Gomez argues that, whatever he said, the bouncers "personally took as me meaning a weapon or gun." SAG No. 10

Ruffin testified: "At some point [Gomez] made a reference that he kept repeating, 'You don't know me. You disrespecting me.' He made a suggestion that he was going to go get a firearm of some sort." 1 RP at 67.

Jasper testified:

Q: You don't recall any statements made by Mr. Gomez?
A: I do.
Q: What other statement do you recall?
A: He told Armand [Ruffin] at one point that "I'm going to get my heat."
…
Q: [W]hat did you understand that to mean?
A. To me it means a gun.

1 RP at 158-59. Gomez was free to argue that Ruffin and Jasper misunderstood him but the prosecutor did not mischaracterize their testimony.

XIII. Moss's gang affiliation

Gomez claims that the trial court erred in allowing testimony about Bryant Moss's gang affiliation. He says this testimony should not have been allowed over his attorney's objection because it is not relevant and the prosecution only wanted to "inflame the passions of the jury because of my alleged gang affiliation." SAG No. 12.

As explained above, the trial court properly exercised its discretion under ER 404(b) in allowing testimony about Gomez's gang affiliation. *See* Part VI. For the same reasons, the trial court properly allowed testimony about Gomez using a fellow gang member's identification to rent a motel room in Las Vegas days after the shooting. *See State v. Boot*, 89 Wn. App. at 790 (finding the *res gestae* exception allows evidence of other bad acts to complete the story of the crime on trial by proving its immediate context).

We affirm the conviction and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

I Concur:

Bridgewater, J.

Houghton, J. (dissenting in part) -- Based on the reasoning set forth in *State v. Hochhalter*, 131 Wn. App. 506, 128 P.3d 104 (2006), I respectfully dissent from the majority's analysis on community placement. Otherwise, I concur.

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Houghton, P.J.